

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
CITY OF VANCOUVER,

Appellant,

v.

SOUTHWEST AIR POLLUTION
CONTROL AUTHORITY,

Respondent.

PCHB No. 79-193

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal from the issuance of a \$250 civil penalty for the alleged violation of Southwest Air Pollution Control Authority (SWAPCA) Regulation I, article IV, section 406(c). Nat W. Washington, presiding, and David Akana, at a formal hearing in Vancouver, Washington on January 24, 1980.

Appellant was represented by its attorney George A. Riemer; respondent was represented by its attorney, James D. Ladley.

Having heard the testimony, having examined the exhibits, and the Board having served its proposed order on the parties, and having

1 received exceptions and replies thereto; and the Board having
2 considered said exceptions and replies, and granting said exceptions
3 in part and denying them in part; and the Board having considered the
4 contentions of the parties now makes these

5 FINDINGS OF FACT

6 I

7 Pursuant to RCW 43.21B.260, respondent has filed with the Board a
8 certified copy of its Regulation I and amendments thereto, which are
9 noted.

10 II

11 Nicholson Road is a graded and gravelled public street within the
12 limits of the city of Vancouver, Washington, and has been designated
13 as a city arterial street under RCW 35.78.010 and RCW 47.26.080.

14 III

15 The respondent, prior to October 3, 1979, had received numerous
16 complaints from residents along Nicholson Road complaining that dust
17 from Nicholson Street was becoming airborne and was invading their
18 premises.

19 IV

20 The gravel surface of Nicholson Road is very dusty during the dry
21 season. Automobile traffic causes dust to become airborne and to
22 become deposited on abutting property in sufficient quantities to
23 cause air pollution and to cause physical discomfort to human beings.

24 V

25 In response to complaints, the city in 1976 placed several light

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1 coats of oil on the road, however, this provided only temporary relief
2 to the dust problem. In the fall of 1979, the city watered the street
3 on several occasions, but this also provided only temporary relief.
4 There is no evidence that anything further was done by the city to
5 control the dust on Nicholson Road.

6 The city had knowledge and was aware that its efforts had not
7 controlled the dust problem on Nicholson Road and the dust was
8 continuing to become airborne and was causing air pollution.

9 VI

10 Prior to October 3, 1979, the city had stopped performing physical
11 repairs on Nicholson Road. However, the city continued to maintain
12 Nicholson Road as a city street and allowed through traffic to
continue to use it.

14 VII

15 Lowering the speed limit and increased enforcement would
16 substantially reduce the amount of airborne dust, but would not reduce
17 it enough to meet the requirement of Regulation I, Article V, Section
18 4.06(c).

19 VIII

20 The application of water and oil to control dust must be repeated
21 so frequently that it cannot be found to be a reasonable or practical
22 long term solution. We find that the only practical way to control
23 the dust on Nicholson Road is to pave it. Financing such paving can
24 be most practically accomplished by utilizing a combination of general
25 tax revenues and funds raised by the sale of local improvement

27 FINAL FINDINGS OF FACT,
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1 district bonds which would be amortized by assessments against the
2 property specially benefited by paving Nicholson Road.

3 IX

4 The property owners along Nicholson Road, who are most offended by
5 airborne dust have made no real effort to encourage the establishment
6 of a local improvement district.

7 X

8 Any Conclusion of Law which should be deemed a Finding of Fact is

9 CONCLUSIONS OF LAW

10 I

11 Regulation I, Article IV, Section 4.06(c), of SWAPCA provides as
12 follows:

13 "No person shall cause, let, allow, or suffer untreated open areas
14 located within a lot or roadway to be maintained without taking
reasonable precautions to prevent air pollution".

15 The appellant City of Vancouver can only be held to have violated this
16 regulation if it is concluded that Nicholson Road is both
17 (a) untreated and (b) is an open area.

18 It is concluded that Nicholson Road is not untreated. "Treat" is
19 defined as follows in the American Heritage Dictionary of the English
20 language:

21 "To subject to some process, action or change, especially (a) to
22 give medical aid to (b) to subject to a chemical or physical
process or application". (emphasis supplied)

23 The following definition of treat is given in Websters Third New
24 International Dictionary:

25
26 FINAL FINDINGS OF FACT,
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1 "To subject to some action (as a chemical reagent) act upon with
2 some agent. To subject (as a natural or manufactured article) to
3 some process, to improve appearance, taste, usefulness, or some
4 other quality". (emphasis supplied)

5 It is obvious that Nicholson Road is not untreated. By being
6 graveled and graded, it has been subjected to substantial change by
7 physical processes which have improved its quality and usefulness.
8 Since Nicholson Road has clearly been subjected to treatment, it does
9 not come within the purview of Regulation I, Article IV, Section
10 4.06(c).

11 II

12 It is concluded that Nicholson Road, a well traveled, graveled,
13 and graded public city street is not an open area. Had the Board of
14 Directors of SWAPCA intended to bring fugitive dust arising from
15 traffic on a public street within the ambit of its air pollution
16 regulations, it would have been easy for them to do so in plain,
17 explicit language. Had the directors sought to include public streets
18 of the state of Washington within its regulations relating to air
19 pollution by dust, it would have been logical for them to have used
20 descriptive terminology found in the statutes relating to public
21 streets and highways, or at least to have used terminology found in
22 the literature relating to public streets and highways. Neither the
23 terms "untreated open areas" or "open area" or any similar term can be
24 found in the statutes or the literature as words descriptive of a
25 publicly traveled street or highway or any part thereof.¹

1. See Chapter 47.04 RCW and Chapter 46.04 RCW

1 The Department of Ecology in WAC 173-400-040(8)(c) prohibits
2 particulate material from becoming airborne from "an untreated open
3 area". It is significant, however, that the Department of Ecology in
4 this regulation did not attempt to use the phrase "untreated open
5 area" as a synonym for, or as being descriptive of, roads of any kind
6 or any part thereof.

7 III

8 The interpretation of Regulation I, Article IV, Section 4.06(c)
9 which eliminates public roads from its operation, does not leave the
10 regulation without substantial force and effect. It could clearly be
11 applied to dust arising from the untreated or unoccupied portion of
12 any lot. It could also be applied to dust arising from an untreated
13 non-public dirt road traversing an open area. In this connection, it
14 could well be argued that the entire open area including the area
15 traversed by the untreated dirt road could be construed as being an
16 open area. The person controlling the open area traversed by such a
17 dirt road might be held liable for the fugitive dust caused by the
18 vehicles utilizing the road. Thus the City of Vancouver or any other
19 city could be held liable under the regulation for dust arising from
20 untreated open areas associated with city-owned property being used
21 for such purposes as sewage disposal, municipal water supply, storage
22 areas, parking lots, etc., and also from dust arising from untreated
23 dirt roads not open to public use as a matter of right, which
24 traverses such city-owned open areas.

IV

Although not necessary in support of the decision herein, it is held that the City of Vancouver is not the person who let, allowed or suffered the dust to become an air pollutant. It is the abutting property owners who have "let, allowed or suffered" the dust to become an air pollutant.

We have found that the only practical way to prevent fugitive dust from settling on adjacent property is to pave Nicholson Road. The City is not required by law to pave its streets. Although the city has an important role, in most cases the ultimate decision to perform street improvements such as paving rests with abutting land owners who benefit from the improvement.² If they wish to use it, they have available to them the local improvement district assessment method of financing such an improvement. In some instances they may receive discretionary financial assistance from the City³ and state but not as a matter of right.

Historically, city street dust has been removed as a problem for abutting property owners by paving, which has largely been financed by means of local improvement district assessments.⁴ By using this time tested method of financing, property owners who are willing to

2. RCW 34.43.120 and RCW 34.43.180.

3. See Exhibit A.3(d)

4. 14 McQuillin - Municipal Corporations (1970 review volume) as Page 11 states:

"Local assessments provided in England several centuries ago . . . and they prevailed from an early day in nearly all american states whose jurisprudence is rooted in common law."

1 pay assessments to finance the cost of paving have increased the value
2 of their property by improving the convenience, comfort and safety of
3 the access to their property and at the same time have eliminated the
4 nuisance of dust. This is the means specifically provided by the laws
5 of the State of Washington for financing the paving of streets.⁵
6 Those unwilling to pay local improvement district assessments have
7 historically been required to put up with the inconvenience of rough
8 streets and the nuisance of dust.

9 There is logic and justice in this historic method of financing
10 street improvements. Dust raised by vehicles traveling on particular
11 sections of graveled streets or roads is ordinarily not a city-wide
12 problem. Ordinarily such dust affects only the nearby property which
13 would be benefited by a paving project financed by a local improvement
14 district assessment.

15 If the property owners along Nicholson Road are successful in
16 requiring the City of Vancouver to utilize the general revenues of the
17 city to pave their street, there would be very little incentive in the
18 future for any property owners to voluntarily assess themselves to
19 finance a paving project. To allow abutting property owners to rely
20 on the Clean Air Act to force street paving to be accomplished by
21 general revenues could well sound the death knell of the local
22 improvement district assessment method of financing such projects.

24 5. See Chapters 34.43 to 34.54 RCW.

1 This traditional and effective method of controlling the nuisance of
2 street dust should not be eliminated in the area covered by SWAPCA by
3 the application of an ambiguously worded air pollution regulation.

4 V

5 The \$250 civil penalty should be vacated.

6 VI

7 Any Finding of Fact which should be deemed a Conclusion of Law is
8 hereby adopted as such.

9 From these Conclusions the Board enters the following

10 ORDER

11 The \$250 civil penalty is vacated.

12 DATED this 7th day of October, 1980.

13 POLLUTION CONTROL HEARINGS BOARD

14
15 
16 NAT W. WASHINGTON, Chairman

17
18 See concurring opinion
19 DAVID AKANA, Member

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26
27 FINAL FINDINGS OF FACT,
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1
2 AKANA, Member, Concurring:

3 I concur with the findings and order of the foregoing decision but
4 would replace the Conclusions of Law with the following:

5 CONCLUSIONS OF LAW

6 I

7 Regulation I, Article IV, Section 4.06(c), of the SWAPCA provides
8 as follows:

9 No person shall cause, let, allow, or suffer
10 untreated open areas located within a lot or roadway
11 to be maintained without taking reasonable
12 precautions to prevent air pollution.

13 The dust which became airborne from untreated areas of Nicholson
14 Road on October 3, 1979, was of a quantity sufficient to cause air
15 pollution within the purview of this regulation.

16 II

17 The City's tight budgetary situation does not excuse the
18 violation. Rather, it is the characteristics of the roadway and the
frequency of its use which determine what measures would constitute

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reasonable precautions to prevent air pollution. It is clear in this particular instance that the use of water and/or oil on the roadway must be repeated so frequently as to be unreasonable. The only reasonable method to control dust from Nicholson Road is to pave it. Such paving can be provided through the local improvement district method of financing. In this way paving would benefit those persons whose property would most benefit from the needed improvement.

III

We conclude that given all the circumstances of this case, the city took such reasonable precautions as was available to it. Accordingly, we do not find a violation of Section 4.06(c) and the \$250 civil penalty should be vacated.

IV

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.



DAVID AKANA, Member